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NO. 90-1912

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

STEPHANIE NORDLINGER,
Petitioner,

v.

KENNETH HAHN, et al.,
Respondents.

On Petition for Writ of Certiorari
to the Court of Appeal
of the State of California

MOTION FOR PERMISSION TO FILE BRIEF OF
AMICUS CURIAE WILLIAM K. RENTZ

and

BRIEF OF AMICUS CURIAE WILLIAM K. RENTZ
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

WILLIAM K. RENTZ, Counsel of Record
Attorney at Law
242 Moore St.
Santa Cruz, CA 95060
(408) 755-5366

Amicus Curiae, in propria persona

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MOTION FOR PERMISSION TO FILE
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PETITION FOR WRIT OF CERTIORARI

William K. Rentz submits herewith his
Motion for Permission to File his Brief of
Amicus Curiae in support of the Petition for
Writ of Certiorari filed herein by Stephanie
Nordlinger. This motion is based on the
Declaration of William K. Rentz and the
Memorandum of Points and Authorities, below.

DECLARATION OF WILLIAM K. RENTZ

I, William K. Rentz, declare:

I am an attorney licensed to practice law in the State of California and am admitted to practice before the U.S. Supreme Court. I filed amicus curiae briefs in support of petitioner Stephanie Nordlinger's position in this case, when it was before the California Court of Appeal, and I filed an amicus brief in support of her petition for review in the California Supreme Court. I hereby request permission to file an amicus curiae brief in this case, in this court.

On May 30, 1991, I mailed to the attorneys for the petitioner and the respondents herein a proposed consent, requesting their written permission to file an amicus brief in this court. Ms. Nordlinger's attorneys have given their consent, which accompanies this motion.

On June 7, 1991, I spoke by telephone with Albert Ramseyer, one of the attorneys for the two respondents, Kenneth Hahn and

the County of Los Angeles. He acknowledged that he had received my request for his consent. He further stated that the position of his office was to refuse consent to my filing an amicus brief. When I asked him for a reason, he declined to give one.

I believe that the brief I propose to file would assist this court considerably in resolving this case correctly. This brief would bring to the court's attention relevant matter that is not discussed in petitioner Nordlinger's brief.

Ms. Nordlinger's brief clearly and amply describes the factual basis for her equal protection claim. In view of this factual analysis, it is impossible to deny that Proposition 13 treats California property taxpayers unequally. But, as partners in the attack on Proposition 13, Ms. Nordlinger and I take different, yet complementary approaches in characterizing this unequal treatment. Ms. Nordlinger focuses on the unequal treatment of taxpayers who own property of equal value.

My proposed brief focuses on how all California taxpayers are similarly situated yet differently treated, regardless of the value of their property.

Ms. Nordlinger's legal argument focuses on legal principles laid down in various U.S. Supreme Court cases decided since 1978, when Proposition 13 was originally sustained by the California Supreme Court in the case of Amador Valley Joint Union High School District v. State Board of Equalization 22 Cal.3d 208, 149 Cal.Rptr. 239, 583 P.2d 1281 (1978). Ms. Nordlinger focuses particularly on Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336, 102 L.Ed.2d 688, 109 S.Ct. 633 (1989), arguing that this decision requires a decision invalidating Proposition 13. Ms. Nordlinger also focuses on the right to travel issue discussed in recent cases, in order to invoke strict scrutiny of the Proposition 13 classifications.

On the other hand, my proposed brief focuses on long-standing, traditional equal protection principles to show how

Proposition 13 violates the Equal Protection Clause, asserting that the Amador Valley decision was wrong even when it was decided. In addition, my brief demonstrates that two purported justifications for Proposition 13 -- the two mentioned in Allegheny's footnote 4 (488 U.S. at 344, fn. 4, 102 L.Ed.2d at 698, fn. 4, 109 S.Ct.633) as possible grounds for distinguishing Proposition 13 from the Webster County assessment practices -- are not at all sufficient to justify the Proposition 13 inequalities.

This court needs to have all these approaches before it, in order to see that Proposition 13 is inescapably surrounded with arguments for its unconstitutionality.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 21, 1991.

WILLIAM K. RENTZ

MEMORANDUM OF POINTS AND AUTHORITIES

Under Supreme Court Rule 37, this court has discretion to approve a motion to file an amicus brief, when a party refuses consent. Under Rule 37.1, that discretion should be exercised in favor of approval, when it appears that the proposed brief will bring new, relevant matter to the court's attention so as to assist the court in reaching a correct decision in the case. The declaration above shows that this condition is satisfied in the present case. Approval to file the amicus curiae brief should thus be granted.

Dated: June 21, 1991

WILLIAM K. RENTZ

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STEPHANIE NORDLINGER,
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BRIEF OF AMICUS CURIAE WILLIAM K. RENTZ
IN SUPPORT OF
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William K. Rentz submits herewith his Brief of Amicus Curiae in support of the Petition for Writ of Certiorari filed herein by Stephanie Nordlinger.

I. INTEREST OF AMICUS CURIAE.

Mr. Rentz's interest in this matter is that he is a property taxpayer in the state of California who is directly affected by the inequalities created by Article XIII A of the California Constitution. Mr. Rentz

filed amicus briefs in support of Ms. Nordlinger's position in the court of appeal proceeding below, and also filed a letter brief in support of Ms. Nordlinger's request for a hearing by the California Supreme Court.

II. SUMMARY.

This case challenges the validity of the basic formula decreed by Article XIII A of the California Constitution (Proposition 13 on the 1978 ballot) for the computation of real property taxes throughout the state of California. Stephanie Nordlinger, the petitioner herein, contends, and this amicus curiae supports her contention, that the use of the Proposition 13 tax computation formula to determine property taxes year after year in an inflationary economy violates the requirements of equal protection embodied in the Fourteenth Amendment to the U.S. Constitution.

Briefly stated, the argument presented herein is as follows: In any current tax

year, all property taxpayers in California are similarly situated, but Proposition 13 treats them unequally, by giving different tax computation dates and different standards for tax amounts payable that year to various taxpayers. As a result, long-time owners of property pay low taxes, while recent purchasers of property pay high taxes without any opportunity to qualify for low taxes. In 1978, the California Supreme Court decided the case of Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 149 Cal.Rptr. 239, 583 P.2d 1281 (1978), in which the court upheld Proposition 13 against an equal protection challenge. But Amador Valley did not decide the issue that is presented here, or if it did, its decision was wrong then and wrong now. None of the justifications offered in Amador Valley were directed at the unequal treatment brought about by Proposition 13, whereby oldtimers pay low taxes and newcomers pay high taxes, and when those

justifications are directed at that unequal treatment, they fail to justify it. Thus, Proposition 13 violates the requirements of equal protection.

In the brief space allowed, this amicus cannot hope to thoroughly analyze the problems in this case. The goal, therefore, will be to demonstrate that there is a serious constitutional problem here that is deserving of this court's attention, and to do that, the focus will be on the most egregious failings in the Amador Valley decision. Other arguments that may be necessary for petitioner to prevail must be left to further briefing, when this court grants the petition for certiorari.

III. PROPOSITION 13 TREATS SIMILARLY SITUATED TAXPAYERS UNEQUALLY.

Under Proposition 13, as under every other property tax system in the United States, all taxpayers in any given current tax year are similarly situated in several relevant and significant ways. For all

these people, taxes are levied in the current year, based on property that they own in the current year. They are required to pay their taxes in the current year, and they pay their taxes with current year dollars, valued in the context of current year incomes and living expenses. They pay these taxes in order to receive or have available to them in the current year government services which the government purchases on their behalf at current year prices.

Unlike any other property tax system, however, Proposition 13 treats taxpayers differently from one another in a very significant way that lies at the heart of its tax computation formula. Proposition 13 gives all taxpayers in any current tax year different tax computation dates and different standards for tax amounts: those who purchased their property in the current tax year are made to pay tax amounts set in the current year in accordance with current standards, while those who purchased their

property in 1975 or before are permitted to pay tax amounts set in 1975 in accordance with 1975 standards, and those who purchased at points in between pay tax amounts set at those points in between in accordance with the standards then applicable.

In an inflationary housing market, this means that those who purchased their houses in 1975 or before will, in 1991, pay very low taxes; on the other hand, those who purchased their houses in the current year, 1991, will pay very high taxes, without having had any opportunity to qualify for low taxes in 1991 because there were no houses available to be purchased at 1975 prices. Proposition 13 offers no way out of these inequalities. The relative differences in tax amounts paid in 1991 by 1975 buyers and 1991 buyers will be reproduced year after year, indefinitely. The only consolation offered by Proposition 13 to the 1991 buyers is that newer buyers in succeeding years will be hit with still greater inequalities in their tax payments.

Thus, Proposition 13 creates fixed, permanent distinctions between an ever-increasing number of perpetual classes of property owners, based on how long they have owned their property, with the inequalities between the newcomers and oldtimers in the system constantly increasing. In Zobel v. Williams, 457 U.S. 55, 59, 64, 72 L.Ed.2d 672, 102 S.Ct. 2309, 2312, 2315 (1982), this court suggested that such a system could not possibly pass constitutional muster.

IV. AMADOR VALLEY MUST BE DISAPPROVED.

Proposition 13 was adopted by the California voters in June, 1978. Immediately afterwards, it was challenged on numerous grounds, including equal protection grounds, in a proceeding filed initially in the California Supreme Court. In September, 1978, barely 3-1/2 months after the proceeding was initiated, the California Supreme Court sustained Proposition 13 on all grounds, in the case of Amador Valley

Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 149 Cal.Rptr. 239, 583 P.2d 1281 (1978). No review of that decision was sought in this court. Amador Valley has governed the outcome of the present case, both in the trial court and in the court of appeal (see Opinion, page 4). The lower courts have declined to consider fully the equal protection arguments made in this case, believing that those arguments have been foreclosed by the Amador Valley decision. Doubtless, the existence of Amador Valley was a key factor in the California Supreme Court's decision to deny review of the court of appeal decision.

The time has come, however, to recognize that Amador Valley is not good law. The equal protection decision in that case must now be reconsidered, because it was wrong when it was decided, and it is even more clearly wrong today.

V. AMADOR VALLEY FAILED TO ADDRESS ITS JUSTIFICATIONS TO THE UNEQUAL TREATMENT.

A. The justifications for Proposition 13 must address the unequal treatment.

The inequalities brought about by Proposition 13, as described above, are undeniable. These are essential and unavoidable facts that are built into the Proposition 13 tax computation formula when it is applied in an inflationary economy.

The key question, then, is whether the inequalities can be justified. If they cannot be justified, then the unequal treatment must be found to violate the Equal Protection Clause.

It is a basic principle of equal protection jurisprudence that the justification offered must address the unequal treatment brought about by the enactment and provide an adequate reason for that particular discrimination. A justification that is directed towards some other aspect of the enactment will not suffice. This principle applies, regardless

of the level of scrutiny used by the court in examining the proposed justification. Conversely, as the court noted in Williams v. Vermont, 472 U.S. 14, 20-21, 86 L.Ed.2d 11, 105 S.Ct. 2465, 2470 (1985), when there is "no unequal treatment," there is "no necessity to justify any discriminatory impact," and there is also "no occasion to address the level of scrutiny to be applied to the discrimination or to identify the State's interest in imposing the differential treatment."

The basic principle -- that the justification must address the unequal treatment and explain why the unequal treatment is arguably rational or fair -- was in existence long before Amador Valley was decided. More particularly, it was actually used as a basis for invalidating state action under the Equal Protection Clause using the rational basis test. See F.S. Royster Guano Company v. Commonwealth of Virginia, 253 U.S. 412, 415-16, 64 L.Ed. 989, 40 S.Ct. 560, 562 (1920) (state's

purpose in discriminating between Virginia corporations with both out-of-state and in-state income and those with only out-of-state income was a legitimate purpose, but it did not explain why two groups should be treated differently); Reed v. Reed, 404 U.S. 71, 76, 30 L.Ed.2d 225, 92 S.Ct. 251, 254 (1971) (state's purpose of reducing probate court workload was legitimate purpose, but still did not explain why men should be preferred over women); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 535-538, 37 L.Ed.2d 996, 93 S.Ct. 2821, 2826-27 (1973) (preventing fraud a legitimate purpose, but does not explain different treatment). This principle has continued to be applied, resulting in the invalidation of state actions, since Amador Valley. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 449-50, 87 LE2d 313, 105 S.Ct. 3249, 3259-60 (1985) (legitimate concern about flood plains, residential densities, population concentrations, congestion on streets, and

fire hazards applied to all group living arrangements, not just homes for mentally retarded).

There are several pre-Amador Valley cases that are often cited as examples of the minimal scrutiny used when the rational basis test applies. Nevertheless, in upholding state enactments against equal protection challenges, even these cases applied the basic principle and found justifications that addressed the unequal treatment. See Williamson v. Lee Optical, 348 U.S. 483, 489, 99 L.Ed. 563, 75 S.Ct. 461, 465 (1955) (state could legitimately assume there was a difference between prescription glasses and over-the-counter glasses that justified different treatment of sellers of the two types of glasses); McGowan v. Maryland, 366 U.S. 420, 426-28, 6 L.Ed.2d 393, 81 S.Ct. 1101, 1105-6 (1961) (state could assume a difference in demand for different products, based upon the type of product and the location of the vendor's place of business, that justified

differential treatment); Ferguson v. Skrupa, 372 U.S. 726, 732-33, 10 L.Ed.2d 93, 83 S.Ct. 1028, 1032 (1963) (lawyers have different training and skills that justify their different treatment); Dandridge v. Williams, 397 U.S. 471, 486, 25 L.Ed.2d 491, 90 S.Ct. 1153, 1162 (1970) (maximum welfare grant, treating large families less favorably than small families, was reasonably necessary to equalize treatment of welfare recipients with treatment of the working poor, who do not get paid based on family size); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 360-62, 365, 35 L.Ed.2d 351, 93 S.Ct. 1001, 1004-6 (1973) (corporations are inherently different from individuals in ways that are significant to the conduct of business, and can therefore be taxed differently); and Kahn v. Shevin, 416 U.S. 351, 352-55, 40 L.Ed.2d 189, 94 S.Ct. 1734, 1736-37 (1974) (tax exemption given to widows but not widowers justified by difference in economic situations of women and men).

Perhaps the simplest and clearest example of this basic principle in action is found in Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251 (1971). In that case, an Idaho statute established a priority list for the appointment of administrators of decedents' estates. Included in one level of priority were certain male and female relatives of the deceased. As a secondary rule, the statute provided that in case of a contest for appointment between a male and a female relative within this level of priority, the male was to be chosen. The state argued that there was a legitimate reason for this discrimination: it reduced the workload of the probate courts by eliminating one class of conflicts that the courts otherwise would have to resolve with a hearing. 404 U.S. at 76, 92 S.Ct. at 254. The Supreme Court acknowledged that this was a legitimate purpose; and it was clear that the discrimination served the purpose. But the court found that this preference for males

violated the Equal Protection Clause, because there was no difference between males and females with regard to their service as administrators that would indicate that the preference for males was reasonable, and there was nothing in the purpose offered that would lead naturally or logically to choosing males over females. In this context, the court said, the Idaho statute embodied "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." 404 U.S. at 76-77, 92 S.Ct. at 254.

As demonstrated by these cases, there are two approaches that can and must be taken to justify a discrimination under the rational basis test. First, the necessary rational relationship between the legitimate state purpose and the discrimination at issue can be shown when the legitimate state purpose arguably points with some reasonable degree of accuracy to the class benefited or burdened and provides some arguably good reason why the benefits or burdens should be

so distributed. Second, starting from a different angle, the rational relationship can be shown when there is arguably an inherent difference between the class benefited and the class burdened that provides an arguably good reason why the benefits and burdens should be so distributed.

It should be noted that these two approaches are not really separate tests, but rather, two different ways of looking at the same test. Whenever one of these is satisfied, you will find that the other is also. Simply stated, sometimes it is easier to approach the problem by looking first at the state's asserted purpose to see where it points, while at other times it is easier to approach the problem by looking first at the differences between the classes to see whether they provide a good reason to discriminate. Whichever approach is taken first, the second approach then serves as a double check.

B. Amador Valley sought to justify the acquisition value system as a whole, instead of the inequalities within that system.

In Amador Valley, the court was presented with an equal protection case in which clear inequalities were identified. However, while the court offered in return a series of justifications for Proposition 13's acquisition value system of taxation taken as a whole, the court failed to address any of these justifications to the inequalities within that system.

The court's justifications for Proposition 13 are found in one paragraph, 22 Cal.3d at 235. In its entirety, the court's reasoning is as follows:

"By reason of section 2, subdivision (a), of the article, except for property acquired prior to 1975, henceforth all real property will be assessed and taxed at its value at date of acquisition rather than at current value (subject, of course, to the 2 percent maximum annual inflationary increase provided for in subdivision

(b)). This "acquisition value" approach to taxation finds reasonable support in a theory that the annual taxes which a property owner must pay should bear some rational relationship to the original cost of the property, rather than relate to an unforeseen, perhaps unduly inflated, current value. Not only does an acquisition value system enable each property owner to estimate with some assurance his future tax liability, but also the system may operate on a fairer basis than a current value approach. For example, a taxpayer who acquired his property for \$40,000 in 1975 henceforth will be assessed and taxed on the basis of that cost (assuming it represented the then fair market value). This result is fair and equitable in that his future taxes may be said reasonably to reflect the price he was originally willing and able to pay for his property, rather than an inflated value fixed, after

acquisition, in part on the basis of sales to third parties over which sales he can exercise no control. On the other hand, a person who paid \$80,000 for similar property in 1977 is henceforth assessed and taxed at a higher level which reflects, again, the price he was willing and able to pay for that property. Seen in this light, and contrary to petitioners' assumption, section 2 does not unduly discriminate against persons who acquired their property after 1975, for those persons are assessed and taxed in precisely the same manner as those who purchased in 1975, namely, on an acquisition value basis predicated on the owner's free and voluntary acts of purchase. This is an arguably reasonable basis for assessment."

(Emphasis in original, in italics).

The first task here is to identify the target of the court's justification efforts. In this paragraph, the court is seeking to

justify what it calls the "acquisition value approach to taxation." In the first sentence of the paragraph, the court notes that "all" property will be taxed "at its value at date of acquisition." In the second sentence, the court finds support for the " 'acquisition value' approach to taxation." In the third sentence it is not just an "approach," it is the acquisition value "system" that is being justified. And finally, towards the end of the paragraph, the court refers to this method of taxation as using "an acquisition value basis." Note also that in each of the first three sentences, the court contrasts the acquisition value approach with the current value approach, thus implying that each approach is a complete, unique, and presumptively valid system of taxation.

Note, however, what the court does not say in this paragraph. The court does not say that it is justifying any classification, any discrimination, or any unequal treatment. That is simply not in

the court's focus. Rather, the court is attempting to justify the acquisition value system as a whole. That is the fatal flaw. What must be justified here is the unequal treatment -- the fact that under Proposition 13, in any particular year the taxpayers are given different tax computation dates, and as a result, the old owners pay low taxes while the new buyers pay high taxes without any opportunity to qualify for low taxes. This discrimination the Amador Valley court fails to justify.

C. Amador Valley sought to characterize and justify Proposition 13 as a system that treated everyone the same.

At this point, a careful reader may rightfully note that in its justification paragraph, the Amador Valley court does mention that the 1975 purchaser of a house would pay low taxes, while the 1977 purchaser of an identical house would pay high taxes. But look closely at what the court actually says about this situation. About the 1975 buyer, the court says:

"For example, a taxpayer who acquired his property for \$40,000 in 1975 henceforth will be assessed and taxed on the basis of that cost (assuming it represented the then fair market value). This result is fair and equitable in that his future taxes may be said reasonably to reflect the price he was originally willing and able to pay for his property, rather than an inflated value fixed, after acquisition, in part on the basis of sales to third parties over which sales he can exercise no control."

22 Cal.3d at 235. Here, in the second sentence, the court is obviously trying to justify something -- but it is not the unequal treatment. Rather, the court is simply justifying the application of the acquisition value approach to the single 1975 buyer mentioned in the first sentence of this example. At this point, the court is making a due process argument, not an equal protection one. See Ross v. Moffitt,

417 U.S. 600, 609, 41 L.Ed.2d 341, 350, 94 S.Ct. 2437 (1974) (" 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection.' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."); Evitts v. Lucey, 469 U.S. 387, 405, 83 L.Ed.2d 821, 835-36, 105 S.Ct. 830 (1985).

The court then goes on to discuss the 1977 buyer, as follows:

"On the other hand, a person who paid \$80,000 for similar property in 1977 is henceforth assessed and taxed at a higher level which reflects, again, the price he was willing and able to pay for that property. Seen in this light, and contrary to petitioners' assumption, section 2 does not unduly discriminate against persons who acquired their property after 1975, for

those persons are assessed and taxed in precisely the same manner as those who purchased in 1975, namely, on an acquisition value basis predicated on the owner's free and voluntary acts of purchase."

22 Cal.3d at 235. Here, in the first sentence, the court acknowledges that the 1977 buyer's taxes will be higher than the 1975 buyer's. But look closely at what the court does and does not do next. The court does not acknowledge any lack of equal opportunity between the 1977 and 1975 buyer with regard to qualifying for low, current year taxes. It does not try to justify the unequal taxes that it does acknowledge by providing some sort of reason for them. Instead, the court denies that there is any unequal treatment! "Contrary to petitioners' assumption," the court says, those who buy in 1977 are "taxed in precisely the same manner as those who purchased in 1975."

Thus, the court maintains a constant course throughout this paragraph, from its

initial assertion that "all" real property will be taxed using the same system, to its final assertion that all taxpayers are treated "in precisely the same manner" by that system. In the end, it is clear that Amador Valley did not attempt to justify any unequal treatment. It sought to characterize Proposition 13 as a tax system that treated everyone in precisely the same manner, and then sought to justify it on that basis.

VI. AMADOR VALLEY'S FAILURE TO ADDRESS ITS JUSTIFICATION EFFORTS TO THE UNEQUAL TREATMENT MAKES IT DISTINGUISHABLE FROM THE PRESENT CASE.

At this point, a skeptical reader may well ask, what difference does Amador Valley's failure to address the unequal treatment make here? The difference is that because Amador Valley did not address the unequal treatment, it did not address the issue involved in the present case, and therefore, it is not precedent for the present case. Therefore, the lower court should not have relied on Amador Valley.

General principles of stare decisis require that Amador Valley be distinguished. So also do the cases of Pace v. Alabama, 106 U.S. 583, 27 L.Ed. 207, 1 S.Ct. 637 (1883), and McLaughlin v. Florida, 379 U.S. 184, 189-91, 13 L.Ed.2d 222, 226-28, 85 S.Ct. 283 (1964). If certiorari is granted, this point will be developed in detail.

VII. THE JUSTIFICATIONS FOUND SUFFICIENT IN AMADOR VALLEY FAIL TO SUPPORT THE PROPOSITION 13 INEQUALITIES.

A. Amador Valley failed to confront the pertinent questions.

Amador Valley's failure to address its justifications to the unequal treatment makes another significant difference: because Amador Valley did not identify the unequal treatment as the target of its justification efforts, it did not confront the pertinent questions that must be answered when justifying unequal treatment. The court did not consider whether there was any inherent difference between the new buyers and the long-term owners that

provided a good reason to make the new buyers pay higher taxes, and the court did not consider whether there was any legitimate purpose that pointed to the new buyers and provided a good reason to make them pay higher taxes. Had the court done so, it could not have sustained Proposition 13.

Again, the shortness of space in this brief prevents a comprehensive analysis. However, the basic point can be made with a step-by-step analysis of the two Amador Valley justifications for Proposition 13 that this court recently suggested might have some merit. See Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336, 344, fn. 4, 102 L.Ed.2d 688, 698, 109 S.Ct. 633 (1989).

B. The "original purchase price" justification fails.

The Amador Valley court's first justification -- paraphrased in part, quoted in part, and applied to the unequal treatment -- goes essentially as follows (22 Cal.3d at 235):

Taxes should be based on "the original cost of the property" because that is the price that each owner "was willing and able to pay for his property," and therefore, differences in taxes will be based "on the owner[s'] free and voluntary acts of purchase."

That justification sounds plausible; but sounding "plausible" is not enough. Even using the rational basis test, the justification must in some substantial way "support the classification at issue." Williams v. Vermont, supra, 472 U.S. at 26, 86 L.Ed.2d 11, 105 S.Ct. at 2473. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." City of Cleburne v. Cleburne Living Center, supra, 473 U.S. at 446, 87 L.Ed.2d 313, 105 S.Ct. at 3258. So now ask the pertinent questions: Does this purpose point to the new buyers and provide a good reason why they should pay higher

taxes? Is there a difference between the new buyers and the long-term owners that provides a good reason to make the new buyers pay higher taxes?

The answer implicit in Amador Valley is this: The goal here is to reward people in proportion to their free and voluntary acts. Those who freely choose high-priced property should pay high taxes, while those who freely choose low-priced property should pay low taxes. There is a difference in this regard between the new and old buyers -- the new ones bought high-priced property, the old ones bought low-priced property.

This answer is wrong, however, because it ignores an essential aspect of the Proposition 13 inequalities: The new buyers had no opportunity to purchase low-priced homes so as to qualify for current low taxes; therefore, they did not "freely" choose high-priced property. One of the basic concepts of fairness in our system of justice is that when different treatment is predicated on free and voluntary acts, all

persons affected by the different treatment must start out with an equal opportunity to reap the benefits through their actions. At very least, the system that confers the burdens and benefits must allow all of its subjects the same freedom to reap those benefits; it must not tie the hands of one group, to the benefit of another. In equal protection jurisprudence -- even in rational basis equal protection jurisprudence -- basic concepts of fairness count. See Jiminez v. Weinberger, 417 U.S. 628, 632, 41 L.Ed.2d 363, 94 S.Ct. 2496, 2499 (1974) ("But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"). Amador Valley itself conceded that basic concepts of fairness should be applied to this case when it said (22 Cal.3d at 235), "... the system may operate on a fairer basis..., "

and, "This result is fair and equitable...."

Proposition 13, however, does not allow all current year taxpayers the same freedom to qualify for low, current year taxes. Thus, with respect to this justification, there may be a legitimate purpose asserted and there may be a difference between the new buyers and the long-term owners, but neither that purpose nor that difference provides a good reason to make the new buyers pay higher taxes, because the required equality of opportunity is completely lacking.

C. The "unrealized paper gains" justification fails.

The second justification goes essentially as follows (22 Cal.3d at 235):

The government should not tax unrealized paper gains (the "unduly inflated, current value" of a long-term property owner's property) because:

(1) paper gains to the taxpayer result in part from "sales to third parties over which sales he can exercise no control," and

(2) the taxpayer might not be "willing and able" to pay the increased taxes based on paper gains.

Again, the justification sounds plausible. But again, ask the two pertinent questions, and a different result appears.

There is a difference between new buyers and long-term owners with respect to paper gains: the long-term owners have them and the new buyers don't. That by itself, however, does not provide a good reason to make the new buyers pay higher taxes. Paper gains equal equity, and equity equals wealth. That makes the long-term owners wealthier than the new buyers, so the long-term owners ought to be paying the higher taxes, not the new buyers.

With respect to the next element in this justification -- the lack of control over the current value of the property, resulting in part from sales to third parties -- both new buyers and long-term owners are in exactly the same situation. The current value of each of their houses

(no matter that one has just recently purchased and the other has not) is brought about by market forces that are essentially beyond the control of each. The prospective new buyer who tries to find a seller who will sell to him in 1991 at 1975 prices is out of luck. No one will sell to him at that price -- he is stuck paying 1991 prices, and can do nothing about that fact. All the old owners, of course, could help out the new buyer somewhat -- they could all put their houses on the market, and so by increasing the supply of housing lower the prices. But they don't do that. They hold onto their houses, and so contribute to the high price the current buyer must pay, in exactly the same degree as the new buyer contributes to the high current value of the long-term owners' homes by his "willingness" to buy someone else's house at 1991 prices.

With respect to the next element -- the "willingness to pay high taxes" element -- it must be assumed that all persons are similarly situated. No one wants to pay

high taxes if they can help it.

With respect to the last element in this justification -- the "ability to pay" element -- there is a difference between new and old buyers, but it doesn't justify the Proposition 13 result: if anyone is less able to pay high taxes, it is the new buyer, not the long-term owner. The new buyer in 1991, on average, has a 1991 income, and from that income he pays exorbitantly high housing payments, with little left over for taxes. The long-term owner in 1991, on average, also has the same 1991 income, but he pays extraordinarily low housing payments, and has a lot of money left over for taxes. This difference does not provide a good reason to make the new buyers pay higher taxes.

Thus, this purported justification also fails to support the Proposition 13 inequalities.

VIII. CONCLUSION.

This case presents a serious question of constitutional law. Proposition 13 has created a property tax system in California that holds as one of its basic premises that people should be treated differently merely because one happens to have been born later than another, or happens to have moved to California later than another, or happens to be a mortal person rather than an immortal corporation, or happens on account of any other fortuitous event to have purchased a house later than another. It makes the newcomer to the property tax system pay higher taxes than the oldtimer, merely because the newcomer enters the system later than the oldtimer when prices are higher and opportunity to qualify for low taxes non-existent -- and then it goes on and on, year after year perpetuating the old inequalities and creating still newer and grander ones that make the initial inequalities pale by comparison.

In Zobel v. Williams, this court suggested that such a system could never be justified. In a footnote in Allegheny Pittsburgh Coal, this court suggested that perhaps it could be justified. The time has now come to resolve the issue. The writ of certiorari should be granted. Proposition 13 violates the Equal Protection Clause of the 14th Amendment.

Respectfully submitted,

WILLIAM K. RENTZ
Amicus Curiae
Attorney at law

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